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No. __-____

IN THE
Supreme Court of the United States

CHARLES ODELL WELDON AND
ERIC A. WILES, INDIVIDUALLY AND IN HIS CAPACITY AS
EXECUTOR OF THE ESTATE OF LARRY ARNOLD WILES,
Petitioners,

v.

NORFOLK SOUTHERN RAILWAY COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state law may impose on plaintiffs bringing asbestos claims preliminary evidentiary medical requirements in cases brought in state court as a condition precedent to the exercise of rights under the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.*, and the Locomotive Boiler Inspection Act, 49 U.S.C. § 20701 *et seq.*

PARTIES TO THE PROCEEDINGS

Petitioners Charles Odell Weldon and Eric A. Wiles, individually and in his capacity as executor of the estate of Larry Arnold Wiles, were defendants in the proceedings before the Court of Common Pleas, Cuyahoga County, and the appellees in the proceedings before both the Ohio Court of Appeals and the Ohio Supreme Court.

Respondent Norfolk Southern Railway Company was the plaintiff in the proceedings before the Court of Common Pleas, Cuyahoga County, and the appellant in the proceedings before both the Ohio Court of Appeals and the Ohio Supreme Court.

Homer R. Bogle and William H. Monroe, Jr., as administrator of the estate of Worth Oliver Bryant, also were defendants in the proceedings before the Court of Common Pleas, Cuyahoga County, but were voluntarily dismissed from the appeal.

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Charles Odell Weldon and Eric A. Wiles, individually and in his capacity as executor of the estate of Larry Arnold Wiles, respectfully petition for a writ of certiorari to review the judgment of the Ohio Supreme Court in this case.

INTRODUCTION

This case raises fundamental questions about the ability of states to impose rules that encumber the exercise of substantive federal rights in state courts because of a state's disagreement with the policies and objectives served by federal law. For more than a century, federal and state courts — including this Court — have confronted difficult questions regarding when states may, and may not, apply rules of "procedure" to federal claimants under the Federal Employers' Liability Act ("FELA") in state court. This Court has repeatedly held that states are prohibited by the Supremacy Clause from applying any state rule to FELA plaintiffs that is at odds with the broad remedial purposes of the statute.

Contrary to an impressive line of federal precedent, the Ohio Supreme Court held that application of an Ohio statute that aims to reduce total asbestos liability and imposes preliminary evidentiary burdens on plaintiffs who seek to vindicate federal rights in state court may alter the evidentiary rules that long have governed claims brought under the FELA. The court upheld statutory rules that impose *stricter* threshold medical evidentiary requirements than asbestos plaintiffs would need to satisfy as a matter of substantive law to have a claim submitted to a jury or to recover under the FELA if litigated in federal court. That holding cannot be reconciled with this Court's FELA preemption decisions or the aims of the FELA itself.

The issues raised by the decision below strike at the heart of this Court's FELA decisions and the interests protected by the Supremacy Clause, and the Ohio court's decision conflicts with decisions of other state supreme courts. The Ohio court's decision upholding application of Ohio's precedent-setting asbestos statute to federal claims gives a green light to all states that seek to rework the elements of federal claims in their efforts to control asbestos litigation. This Court should grant review of the Ohio Supreme Court's decision and reaffirm the core principle animating the Supremacy Clause that, even in the pursuit of arguably laudable ends, states may not disregard the supremacy of federal law. Certiorari is independently warranted as the decision below creates an immediate disparity in application of the FELA both within Ohio and nationwide: plaintiffs in Ohio now face substantially higher burdens in pursuing FELA claims in state courts than they would in federal court in Ohio, and they face more restrictive rules in Ohio state court than plaintiffs in other states. In light of Congress's overriding purpose in enacting the FELA of creating national uniformity, such a glaring disparity cannot be left uncorrected by this Court.

OPINIONS BELOW

The opinion of the Ohio Supreme Court (Pet. App. 1a-16a) is reported at 875 N.E.2d 919. The opinion of the Ohio Court of Appeals (Pet. App. 17a-31a) is reported at 850 N.E.2d 1281. The orders and opinion of the Court of Common Pleas (Pet. App. 32a-39a) are not reported.

JURISDICTION

The Ohio Supreme Court entered its judgment on October 10, 2007. A motion for reconsideration was denied on December 12, 2007. *See* Pet. App. 40a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* ("FELA"), the Locomotive Boiler Inspection Act, 49 U.S.C. § 20701 *et seq.* ("LBIA"), and H.B. 292 (2004 Ohio Laws File 88 (Am. Sub. H.B. 292)) are set forth at Pet. App. 41a-74a.

STATEMENT OF THE CASE

A. The FELA

The rapid growth of railroads in the late twentieth century drove the nation's economic ascendency. That progress came, however, with considerable costs, including pervasive injuries and death suffered by the nation's railroad workers. As President Benjamin Harrison told Congress in 1889, "[i]t is a reproach to our civilization that any class of American workmen, should in the pursuit of a necessary and useful vocation, be subjected to a peril of life and limb as great as that of a soldier in time of war." Melvin L. Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liability*

Act, 18 Law & Contemp. Probs. 160, 162 (1953). Those dangers were compounded by the fact that the task of regulating railroad safety during that time "fell . . . to the states through which the lines ran." *Id.* State-by-state regulation was "chaotic," and the "lack of uniformity" in laws "contributed greatly to the casualty lists among . . . railroad men." *Id.*

Congress responded to those concerns in 1908 by enacting comprehensive, national legislation designed to recompense railroad workers for their injuries. The FELA fulfilled several objectives.

"One of the purposes of the [FELA] was to 'create uniformity throughout the Union' with respect to railroads' financial responsibility for injuries to their employees." *Norfolk & Western Ry. v. Liepelt*, 444 U.S. 490, 493 n.5 (1980) (quoting H.R. Rep. No. 60-1386, at 3 (1908)). As this Court explained in the decade following the FELA's enactment, "[w]hether and in what circumstances railroad companies . . . shall be required to compensate their employees . . . are matters in which the nation as a whole is interested, and there are weighty considerations why the controlling law should be uniform and not change at every state line." *New York Cent. R.R. v. Winfield*, 244 U.S. 147, 149 (1917).

The FELA also reflected Congress's judgment regarding the special needs of railroad workers. *See Sinkler v. Missouri Pac. R.R.*, 356 U.S. 326, 329 (1958). Indeed, an aim driving enactment of national legislation was "eliminat[ing] a number of traditional defenses to tort liability" under state law that had thwarted railroad workers' injury claims in order "to facilitate recovery." *Atchison, T. & S.F. Ry. v. Buell*, 480 U.S. 557, 561 (1987). In view of those intentions, the FELA has consistently been construed in light of

Congress's "broad purpose" of promoting the welfare of railroad workers. *Sinkler*, 356 U.S. at 329-30. This Court also has stressed that the FELA "is defined in broad language, which has been construed even more broadly," and that courts must use "a standard of liberal construction in order to accomplish Congress' objects." *Buell*, 480 U.S. at 561-62 (footnote, brackets, and internal quotations omitted).

In enacting the FELA, Congress elected to forgo a workers' compensation scheme. The FELA thus provides that "[e]very common carrier by railroad" engaged in interstate commerce "shall be liable in damages to any person suffering injury while he is employed by such carrier" due to negligence of the railroad. 45 U.S.C. § 51. Under the FELA, plaintiffs may elect to pursue their remedies in federal or state court. *See id.* § 56.[1]

The FELA encompasses a wide array of injuries to railroad workers. Cognizable harm under the FELA includes not only physical injuries arising from accidents, but also occupational diseases arising from workplace exposure to asbestos. *See Norfolk & Western Ry. v. Ayers*, 538 U.S. 135, 150-57 (2003) (FELA includes damages from asbestosis, including fear-of-cancer injuries); *Urie*, 337 U.S. at 180-81 ("breadth" of FELA and its "humanitarian" purpose

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[1] The LBIA imposes absolute liability on carriers for injuries caused by unsafe locomotive conditions. *See* 49 U.S.C. § 20701(1). The LBIA was enacted subsequent to the FELA and "does not purport to confer any right of action upon injured employees," but it does "substantively . . . amend[] . . . the [FELA]." *Urie v. Thompson*, 337 U.S. 163, 188-89 (1949). The statutes are interpreted *in para materia* with the "purpose and effect of facilitating employee recovery." *Id.* at 189.

counsel in favor of reading FELA to cover "occupational disease" such as silicosis).

B. Ohio's Asbestos Reform — H.B. 292

In 2004, Ohio adopted a path-breaking statute aimed at overhauling asbestos litigation, including litigation arising under federal laws such as the FELA. *See* 2004 Ohio Laws File 88, Am. Sub. H.B. No. 292 ("H.B. 292").

The purpose of H.B. 292 was to reduce total liability paid by defendants in connection with asbestos claims. The state legislature explained its view that "[t]he current asbestos personal injury litigation system" under state and federal law "is unfair and inefficient, imposing a severe burden on litigants and taxpayers alike." H.B. 292 § 3(A)(2). The legislature expressed a concern with aggregate liability, finding that, "[n]ationally, asbestos personal injury litigation has already contributed to the bankruptcy of more than seventy companies." *Id.* § 3(A)(4). The magnitude of that liability, the legislature concluded, had caused unemployment and was having a "ripple effect" throughout the national economy. *Id.* § (3)(A)(4)(a)-(e). The legislature further found it inappropriate that successful asbestos claims were being brought by those "who have some physical sign of exposure to asbestos," but who, in the legislature's judgment, "are not sick." *Id.* § (3)(A)(5).

In an effort to restrict the ability of asbestos claimants to proceed with claims, H.B. 292 imposes on such plaintiffs detailed threshold evidentiary requirements, which apply to federal as well as state claims: while excepting bankruptcy and workers' compensation claims, H.B. 292 applies to all other "civil action[s]" brought in tort under state or federal

law. Ohio Rev. Code Ann. § 2307.91(M). There is no exception for claims brought under the FELA.

As relevant here, H.B. 292 erects conditions precedent to bringing nonmalignant, lung cancer, and wrongful death claims. The statute provides that "[n]o person shall bring . . . a tort action alleging an asbestos claim based on a nonmalignant condition in the absence of a prima-facie showing . . . that the exposed person has a physical impairment, that the physical impairment is a result of a medical condition, and that the person's exposure to asbestos is a substantial contributing factor to the medical condition." *Id.* § 2307.92(B). The prima facie showing consists of meticulous evidentiary submissions that must be made in order for a suit to proceed. *See, e.g., id.* § 2307.92(B)(1), (2). H.B. 292 goes so far as to regulate with great detail the tests that must be used to satisfy the showing, *see id.* § 2307.92(B)(3), as well as the qualifications of the medical professionals that conduct the tests, *see, e.g., id.* § 2307.92(B)(1) (evidence must come from a "competent medical authority"); *id.* § 2307.91(Z) (establishing multipronged requirements for "competent medical authority").

H.B. 292 requires lung cancer claimants to make similar showings. Such claimants must provide "[e]vidence of the exposed person's substantial occupational exposure to asbestos." *Id.* § 2307.92(C)(1)(c)(1). Substantial occupational exposure can be shown only if highly specific medical conditions are satisfied. *See id.* § 2307.91(GG). The statute also creates rebuttable presumptions governing this showing: there is a default "presumption," which the plaintiff has the "burden of proof to rebut," that 10 years have elapsed

from the date of exposure to asbestos and lung cancer. *Id.* § 2307.92(C)(1)(b).[2]

Under H.B. 292, when a defendant challenges a plaintiff's compliance with the threshold evidentiary rules, "the court shall determine from all of the evidence submitted whether the proffered prima-facie evidence meets the minimum requirements" of the statute. *Id.* § 2307.93(B). Whereas a failure to satisfy the threshold evidentiary rules results in "administrative[] dismiss[al] . . . without prejudice" until such time as a plaintiff can satisfy the rules, *id.* § 2307.93(C), if a plaintiff does satisfy the threshold requirements, the court's findings "are not admissible at trial" and create no "presumption" of liability or injury, *id.* § 2307.92(G).

C. Proceedings in State Court

1. Prior to enactment of H.B. 292, petitioners Charles Weldon and Eric Wiles, individually and in his capacity as executor of the estate of Larry Wiles, brought suit in the Cuyahoga County Court of Common Pleas in Ohio exclusively under the FELA and the LBIA. The complaint alleges that petitioners, former employees of Norfolk, were exposed to asbestos as a result of negligence of Norfolk and that, as a result, petitioners contracted "occupational pneumoconiosis including but not limited to asbestosis, silicosis, and[/]or coal workers lung disease and/or lung cancer." Compl. ¶ 14. The complaint also alleges damages resulting from petitioners' fear of contracting cancer as a result of physical conditions. *See id.* ¶ 15.

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[2] Wrongful death claimants are required to satisfy similar evidentiary burdens and face additional rules regarding burdens of proof. *See* Ohio Rev. Code Ann. § 2307.92(D).

After enactment of H.B. 292, Norfolk brought an action in state court seeking a declaration that (i) petitioners failed to comply with threshold evidentiary requirements set forth in H.B. 292; (ii) H.B. 292 applies to federal-law claims, including those brought under the FELA; and (iii) H.B. 292 does not violate the Supremacy Clause. The court dismissed Norfolk's action, holding that federal law preempted application of H.B. 292 to petitioners' FELA claims. *See* Pet. App. 34a-39a.

Norfolk appealed the trial court's decision. The Eighth District Court of Appeals affirmed the district court, holding that application of H.B. 292 to FELA claimants was preempted as it unlawfully burdened the exercise of federal rights. *See id.* at 17a-31a. The court of appeals applied the principle that "[p]eculiarities of local law may not gnaw at rights rooted in federal legislation" and held that H.B. 292 would undermine petitioners' "substantive rights to assert a cause of action under federal law." *Id.* at 29a (internal quotations omitted).

2. The Ohio Supreme Court reversed the decision of the Ohio appellate court, with two justices dissenting. *See* Pet. App. 1a-16a.

The court began by noting that the legislature enacted H.B. 292 based on its judgment that the current asbestos litigation system is "unfair and inefficient." *Id.* at 2a. The court then addressed whether "the prima facie filing requirements" of H.B. 292 are "substantive or procedural," noting that the FELA "preempts all substantive state law in the field." *Id.* at 7a. Relying entirely on state law to answer that question, the court held that H.B. 292 was procedural on the ground that it does not "grant a right or impose a duty that gives rise to a cause of

action." *Id.* (internal quotations and brackets omitted). The court explained that, notwithstanding the fact that H.B. 292 creates conditions precedent to the exercise of federal rights in state court, "the impact of [H.B. 292] is to establish a procedural prioritization of the asbestos-related cases on the court's docket. Nothing more." *Id.* at 7a-8a. H.B. 292, the court concluded, thus imposes no "substantive burdens." *Id.* at 8a.

The court's view of H.B. 292 as procedural did not "end [its] analysis," however, as even procedural rules may be preempted if they "impair a claimant's ability to enforce a federal right." *Id.* The court concluded that H.B. 292 did not impair rights under the FELA, relying primarily on this Court's decisions in *Minneapolis & St. Louis Railroad v. Bombolis*, 241 U.S. 211 (1916), and *Missouri ex rel. Southern Railway v. Mayfield*, 340 U.S. 1 (1950). *See* Pet. App. 9a-10a. Echoing its conclusion that H.B. 292 was procedural, but without analyzing the effects of H.B. 292, the court held that H.B. 292 fell within the purview of those cases because it does not "bear upon [a FELA plaintiff's] substantive right to recover." *Id.* at 12a (internal quotations omitted).[3]

Chief Justice Moyer and Justice Pfeifer dissented. The dissenting justices rejected the view that H.B.

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[3] Although H.B. 292 purports to apply to claims brought in federal and state court, *see* Ohio Rev. Code Ann. § 2307.91(M), the court below considered H.B. 292's application to FELA claims brought in state court, *see* Pet. App. 12a. Because a state cannot dictate rules of procedure in federal court (in a non-diversity case) or prescribe the elements of federal law, H.B. 292 cannot apply to federal claims brought in federal court. Therefore, one effect of the decision is to create a disparity in FELA's application between state and federal courts within Ohio.

292 was a mere rule of procedure, explaining that "'[t]he new Ohio requirement precludes [FELA] claimants from proceeding on their claims until filing the report satisfying [H.B. 292's] requirements,'" which, the dissenters reasoned, "'would "gnaw" at the [FELA] claimants' substantive rights to assert a cause of action under federal law in a state court.'" *Id.* at 15a-16a (quoting Pet. App. 29a (¶ 26)).

REASONS FOR GRANTING THE PETITION

This Court has regularly granted certiorari to review state high court decisions out of step with Congress's purposes in enacting the FELA, as interpreted by a long line of decisions of this Court. The decision below falls squarely within that category of cases, as it upholds a state legislature's effort to limit rights available under state and federal law, including the FELA. Because that holding rests on a deep misunderstanding of this Court's FELA jurisprudence in an area where national uniformity and a broad remedial approach to railroad workers' injuries are crucial, the petition should be granted.

In addition, as shown in Part II of this petition, the decision of the Ohio Supreme Court will only deepen the longstanding confusion in and divisions among state high courts regarding FELA preemption. Left standing, the decision below invites other state legislatures and courts to encumber the exercise of federal rights in efforts to reform asbestos litigation, an outcome that can be reconciled neither with this Court's FELA decisions nor with the Supremacy Clause.

I. THE DECISION OF THE OHIO SUPREME COURT CONFLICTS WITH DECISIONS OF THIS COURT AND UNDERMINES THE NATIONAL POLICY EMBODIED IN THE FELA

A. The Court Below Erred In Holding That Application Of H.B. 292 To FELA Claims Is A Matter Only Of Local Procedure

The Ohio Supreme Court held that "the impact of [H.B. 292] is to establish a procedural prioritization of the asbestos-related cases on the court's docket." Pet. App. 7a. H.B. 292, the court concluded, could not be preempted because it "pertain[s] to the machinery for carrying on a suit" and is thus "procedural in nature, not substantive." *Id.* at 8a. The court's fundamental error on a matter of federal law warrants this Court's review.[4]

1. H.B. 292's Purpose of Reducing Total Asbestos Liability Evidences the Substantive Nature of the Threshold Evidentiary Rules

Felder v. Casey, 487 U.S. 131 (1988) — a decision not cited by the court below — provides the proper framework for analyzing the procedural or substantive nature of H.B. 292. There, this Court held that a Wisconsin statute could not impose an additional threshold filing requirement on plaintiffs bringing 42 U.S.C. § 1983 claims in state court. The Wisconsin

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[4] The Ohio Supreme Court independently erred in applying state law to determine whether H.B. 292 was procedural. Whether a rule is procedural or substantive is decided by federal, not state, law. *See Monessen Southwestern Ry. v. Morgan*, 486 U.S. 330, 333-35 (1988) (rejecting view that rule regarding prejudgment interest was "a mere 'rule of procedure'" because under *federal* law "the proper measure of damages . . . is an issue of substance") (internal quotations omitted).

Supreme Court had upheld the statute, which dictated that, "before suit may be brought in state court against a state or local governmental entity or official," a plaintiff must provide notice to the government. *Id.* at 134. The Wisconsin court held that, "while Congress may establish the procedural framework under which claims are heard in federal courts, States retain the authority under the Constitution to prescribe the rules and procedures that govern actions in their own tribunals." *Id.* at 137.

In reversing the Wisconsin Supreme Court's decision, this Court articulated principles that control the outcome here. The Court rejected the view that the Wisconsin statute was solely procedural, reasoning that "it conditions the right of recovery that Congress has authorized, and does so for a reason manifestly inconsistent with the purposes of the federal statute: to minimize governmental liability." *Id.* at 141. The Court explained that "[t]he state notice-of-claim statute is more than a mere rule of procedure," as it "is a substantive condition on the right to sue governmental officials." *Id.* at 152. "State courts," the Court concluded, "are not free to vindicate the substantive interests underlying a state rule of decision at the expense of the federal right." *Id.*

Those principles apply here and establish why the Ohio Supreme Court erred in classifying H.B. 292 as procedural. The aim of H.B. 292, like the statute in *Felder*, is to reduce the number of successful claims, thereby reducing total liability. *See supra* p. 6. Thus, just as in *Felder*, H.B. 292's threshold evidentiary rules are substantive as they "condition[] the right of recovery that Congress has authorized [under the FELA], and do[] so for a reason manifestly

inconsistent with the purposes of the federal statute: to minimize . . . liability." 487 U.S. at 141.[5]

2. *The Operation of H.B. 292's Threshold Evidentiary Rules Imposes Substantive Burdens That Conflict with This Court's and Other State Court Decisions*

Beyond the purpose of the state statute, H.B. 292's threshold evidentiary requirements operate in a more substantive fashion than as simple rules of procedure. In short, these state rules effectively alter the substance of federal FELA claims.

First, as a matter of federal substantive law, this Court has adopted rules governing causation and proof of causation under the FELA. "[T]he test [for causation] . . . is simply whether the proofs justify . . . the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 506 (1957). That "relaxed standard of causation" reflects "Congress' remedial goal" in enacting the FELA. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 543 (1994). In this sense, the Ohio Supreme Court's ruling below — affirming strict causation standards — directly conflicts with the holding of the Nebraska Supreme Court in *Naidoo v. Union Pacific Railroad*, 402 N.W.2d 653, 657 (Neb. 1987): "The traditional concept of proximate cause is abrogated in FELA cases by the fact that the plaintiff's proof is sufficient to

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[5] Clear evidence of the legislature's aim to reign in what it perceived to be overly expansive federal remedies comes from the fact that H.B. 292 restricts an entire category of claims — fear-of-cancer claims — that this Court has squarely held are recoverable. *Compare* Ohio Rev. Code Ann. § 2307.94(B) (eliminating fear-of-cancer claims) *with Ayers*, 538 U.S. at 157-59.

state a claim if it shows that the carrier's negligence, however slight, played some part in causing the injury."[6]

H.B. 292 imposes a different, stricter causation standard: as a threshold matter, an injured railroad worker must show that "exposure to asbestos" is "a *substantial contributing factor* to the medical condition." Ohio Rev. Code Ann. § 2307.92(B) (emphasis added); *see id.* § 2307.92(B)(2) (plaintiff must present evidence of "most probable causes of . . . medical problems"). The effect of the threshold evidentiary rules is thus substantive: whereas federal law would require a FELA plaintiff to satisfy a relaxed standard of causation to have a question submitted to a jury or even to prevail, under H.B. 292 a plaintiff must, to avoid permanent dismissal, satisfy a stricter standard of "substantial contributing factor." *See id.* § 2307.91(FF) ("substantial contributing factor" must be "predominate cause" of injury and supported by "reasonable degree of medical certainty").

Second, the Ohio Supreme Court's ruling conflicts with this Court's well-settled precedent that quanta

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[6] This Court avoided deciding whether the FELA dispenses with a proximate cause requirement and the import of *Rogers* in *Norfolk Southern Railway v. Sorrell*, 127 S. Ct. 799, 804-05 (2007). The key point here is that *no* construction of the FELA's causation standard, which is an important part of the substance of a FELA claim, is consistent with Ohio's "substantial contributing factor" formulation. *Compare id.* at 813 (Ginsburg, J., concurring in the judgment) (noting that, "[i]n FELA cases, strong policy considerations inform the causation calculus" and that, whatever the legal label, *Rogers* stands for the proposition that "a FELA plaintiff can get to a jury if he can show that his employer's negligence was even the slightest cause of his injury") *with id.* at 810 (Souter, J., concurring) (causation standard is whether "negligence was the proximate cause in whole or in part") (internal quotations omitted).

and burdens of proof under the FELA are matters of federal *substantive* law. *See, e.g., Central Vermont Ry. v. White*, 238 U.S. 507, 512 (1915) ("[I]t is a misnomer to say that the question as to the burden of proof . . . is a mere matter of state procedure."); *New Orleans & N.E.R.R. v. Harris*, 247 U.S. 367, 372 (1918) ("burden of proof is a matter of substance and not subject to control by laws of the several States").[7] As this Court explained in *Brady v. Southern Railway*, 320 U.S. 476 (1943), under the FELA, and by virtue of "the supremacy clause," whether evidence submitted in a FELA case is sufficient to establish liability is an issue of federal law: "[o]nly by a uniform federal rule as to the necessary amount of evidence may litigants under the federal act receive similar treatment in all states." *Id.* at 479.

Here again, H.B. 292's threshold evidentiary rules substantively depart from those well-entrenched principles: H.B. 292 regulates what a FELA plaintiff must prove and the manner in which that proof must be satisfied. Plaintiffs alleging nonmalignant, lung cancer, or wrongful death claims face a series of detailed burdens of proof and production that have no connection to the substantive law of the FELA. *See supra* pp. 7-8. To classify such rules as procedural and "[n]othing more," as did the court below, Pet. App. 7a-8a, is a "misnomer," *White*, 238 U.S. at 512.

Third, as a matter of substantive federal law governing the FELA, even the slightest evidence is adequate to raise a jury question, and circumstantial

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[7] *See* Alfred Hill, *Substance and Procedure in State FELA Actions – the Converse of the Erie Problem*, 17 Ohio St. L.J. 384, 388-90 (1956) (proof issues under FELA must "accord with the basic purposes of the substantive federal policy being executed" under the statute).

evidence is alone sufficient. *See Rogers*, 352 U.S. at 508 & n.17; *supra* note 6; *see also Mendoza v. Southern Pac. Transp. Co.*, 733 F.2d 631, 632-33 (9th Cir. 1984) (under federal principles, "only 'slight' or 'minimal' evidence" is necessary to raise "jury question" under FELA, and jury has "broad power to engage in inferences in FELA cases"). In FELA cases, moreover, it has long been a guiding principle that "'close or doubtful' cases should not be taken from the jury." Hill, 17 Ohio St. L.J. at 401.

Dice v. Akron, Canton & Youngstown Railroad, 342 U.S. 359 (1952), illustrates that point. There, the Ohio Supreme Court held that, under state rules of procedure, "factual issues as to fraud in the execution of [a] release were properly decided by the judge rather than by the jury." *Id.* at 361. This Court reversed, holding that "to deprive railroad workers of the benefit of a jury trial where there is evidence to support negligence 'is to take away a goodly portion of the relief which Congress has afforded them.'" *Id.* at 363 (quoting *Bailey v. Central Vermont Ry.*, 319 U.S. 350, 354 (1943)). The right of railroad workers to have a jury decide the issue of fraud is "too substantial a part of the rights accorded by the [FELA] to permit it to be classified as a mere 'local rule of procedure.'" *Id.*

Dice long ago rejected the very approach that H.B. 292 imposes as a prerequisite to bringing suit in state court. H.B. 292 requires a judge to resolve issues of the sufficiency of evidence and burdens of proof, even though those rules bear no relationship to, and in fact exceed, what a FELA plaintiff would need to show to have a question submitted to the jury. Because states are not free under *Dice* to take close questions of fact away from the jury at trial,

they may not enact statutes that require state judges to take questions from the jury by ensuring that issues of fact never proceed to trial in the first place.

B. The Court Below Erred In Holding That Application Of H.B. 292 To FELA Claims, Even If A Matter Of Local Procedure, Does Not Unduly Burden Federal Rights

1. H.B. 292's Threshold Evidentiary Rules Unduly Burden Federal Rights

Whether classified as procedural or substantive, H.B. 292 is preempted under the Supremacy Clause in purporting to impose threshold evidentiary rules on FELA claimants in state court. "[A] substantive right . . . arising under the [FELA] cannot be lessened or destroyed by a rule of practice." *Norfolk Southern R.R. v. Ferebee*, 238 U.S. 269, 273 (1915); *see South Buffalo Ry. v. Ahern*, 344 U.S. 367, 372 (1953) ("[P]eculiarities of local law may not gnaw at rights rooted in federal legislation."); *Davis v. Wechsler*, 263 U.S. 22, 24 (1923) (Holmes, J.) ("Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal Rights . . . is not to be defeated under the name of local practice.").

The Ohio Supreme Court's decision to uphold H.B. 292 cannot be squared with this Court's decision in *Brown v. Western Railway of Alabama*, 338 U.S. 294 (1949). In *Brown*, a railroad worker brought suit in Georgia state court under the FELA for injuries allegedly sustained while working in railroad yards. *See id.* at 295. The trial court, in a decision upheld by the Georgia Supreme Court, dismissed the complaint, applying a "Georgia rule of practice to construe pleading allegations most strongly against the pleader." *Id.* (internal quotations omitted). This

Court reversed the decision below, holding that rights under the FELA "cannot be defeated by the forms of local practice." *Id.* at 296. "Strict local rules of pleading cannot be used to impose unnecessary burdens upon rights of recovery authorized by federal laws." *Id.* at 298. A failure "to protect federally created rights" from "over-exacting local requirements" would undermine "uniformity in adjudication of federally created rights." *Id.* at 299.

A straightforward application of *Brown* makes clear that H.B. 292 cannot be applied to FELA plaintiffs in light of the substantial burdens that H.B. 292 imposes on FELA claimants. *See supra* pp. 14-18. Indeed, the burdens here are far more substantial than those in *Brown*, which involved a contest between liberal and strict pleading standards, reflecting "different concepts concerning the functions the pleadings are to serve in such matters as adequacy of notice and definition of the factual issues." Hill, 17 Ohio St. L.J. at 409 n.150. H.B. 292, on the other hand, imposes threshold *evidentiary* (rather than pleading) burdens that exceed the *substantive* showing that would be required as a matter of federal law and that operate as conditions precedent to the exercise of federal rights. As a matter of law and basic consistency, *Brown* requires reversal of the Ohio Supreme Court's decision.

The Ohio Supreme Court's proposed distinctions of *Brown* have no merit. *See* Pet. App. 12a-13a. The court first held that the pleading practice in *Brown* was "antithetical to that used in the federal courts." *Id.* at 13a. But that is no distinction at all: H.B. 292 imposes preliminary evidentiary burdens that exceed the showings that a FELA plaintiff would be required to make at trial or in federal court. *See*

supra note 3. To the extent the court based this conclusion on the practice of the federal MDL court, that reasoning is seriously flawed, as discussed below. *See infra* pp. 24-25. The court also held that the rule in *Brown* was "a dismissal with prejudice, while . . . failure to comply with the prima facie filing requirements carries no such penalty." Pet. App. 13a. That is a distinction without a difference: the consequence of H.B. 292 is that a FELA plaintiff *cannot proceed* with a claim unless he or she satisfies evidentiary burdens that exceed those the plaintiff would need to make out to establish ultimate liability. That is not procedural prioritization; that is *de facto* dismissal *with* prejudice.

Moreover, the decision below is inconsistent with two well-established policies underlying the FELA. *First*, this Court has long held that the FELA is to be interpreted broadly to advance the welfare of railroad workers. *See, e.g., Kernan v. American Dredging Co.*, 355 U.S. 426, 432 (1958) ("it is clear that the general congressional intent [in enacting the FELA] was to provide liberal recovery for injured workers"); *Urie*, 337 U.S. at 181-82 ("[R]estriction[s] as to the kinds of employees covered, the degree of negligence required, or the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the [FELA] followed by this Court."); *Jamison v. Encarnacion*, 281 U.S. 635, 640 (1930) ("[The FELA] is not to be narrowed by refined reasoning . . . . It is to be construed liberally to fulfill the purposes for which it was enacted . . . ."). The substantial and substantive burdens imposed by H.B. 292 on FELA plaintiffs,

enacted out of a desire to reduce total asbestos recovery, cannot be reconciled with that principle.[8]

Second, application of H.B. 292 to FELA claims undermines Congress's "purpose[]" of "'creat[ing] uniformity throughout the Union' with respect to railroads' financial responsibility for injuries to their employees." *Liepelt*, 444 U.S. at 493 n.5 (quoting H.R. Rep. No. 60-1386, at 3). By setting itself apart, Ohio now upsets that uniformity, and the logic of the decision below would invite other states to erect substantial and conflicting roadblocks before plaintiffs asserting rights under the FELA. In that sense, the Ohio approach could not conflict more starkly with that of California, whose Supreme Court has held that "Congress enacted the FELA to achieve national uniformity in personal injury actions by railroad employees against their employers." *Lund v. San Joaquin Valley R.R.*, 71 P.3d 770, 779 (Cal. 2003). For that reason, even if an issue "could be considered procedural rather than substantive, state procedure must give way if it impedes the uniform application of the federal statute essential to effectuate its purpose." *Id.* (internal quotations omitted).[9]

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[8] The burden on railroad workers in Ohio is intensified by the fact that H.B. 292 excludes workers' compensation claims (a remedy that is foreclosed to FELA plaintiffs). *See supra* p. 6. FELA plaintiffs who cannot satisfy the threshold burdens have no remedy under state or federal law.

[9] *See Ahern*, 344 U.S. at 371-72 (FELA, "supplanting a patchwork of state legislation with a nationwide uniform system of liberal remedial rules," prevents "[s]tate legislatures" from "destroy[ing] uniformity"); *see also McGraw v. Norfolk & Western Ry.*, 500 S.E.2d 300, 304 (W. Va. 1997) ("[O]nly if federal law controls can FELA be given the uniform application throughout the country essential to effectuate its purposes.") (internal quotations omitted).

2. *The Ohio Supreme Court's Rationales for Holding That H.B. 292 Does Not Burden Federal Rights Are Deeply Flawed*

In concluding that H.B. 292 does not burden rights under the FELA, the court below failed to judge the effects of H.B. 292 in light of the broad remedial purposes of the statute and this Court's insistence on uniformity in FELA jurisprudence. Two specific errors infect the court's analysis.

a. Bombolis *and* Mayfield *do not support the decision below*

The Ohio Supreme Court held that this Court's decisions in *Bombolis* and *Mayfield* "support the position that the application of the prima facie filing requirements . . . does not violate the Supremacy Clause." Pet. App. 9a. That is not so. First, there is a substantial question whether *Bombolis* remains good law: at the time of *Bombolis*, it was accepted that "there was some area of procedure that the state could continue to regulate" but, if that area of procedure exists today, it is "*de minimis*" and thus "it may reasonably be doubted whether the Bombolis decision has any continuing authoritativeness beyond its particular facts." Charles A. Wright, *The Law of Federal Courts* § 45, at 272 (4th ed. 1983) ("Wright"). *Dice*, for example, substantially narrowed *Bombolis* in holding that a state was *not* free to take a question of fact away from the jury in a FELA case. *See* Richard H. Fallon, Jr., *et al.*, *Hart & Wechsler's The Federal Courts and The Federal System* 484 (4th ed. 1996) (questioning whether *Bombolis* survives *Dice*).[10]

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[10] *See also* Hill, 17 Ohio St. L.J. at 393 (noting "more recent cases . . . show an increasing tendency to compel the states to

In all events, *Bombolis* is inapposite. The narrow issue in *Bombolis* was whether the Seventh Amendment's guarantee of a jury trial was infringed by a state rule allowing a non-unanimous jury verdict. The Court held that it was not. *See* 241 U.S. at 219. At best, the decision confirms that there are instances in which local rules of procedure may be applied to FELA claims, but nothing in *Bombolis* or the Ohio Supreme Court's analysis suggests why the rules at issue *here* — H.B. 292's threshold evidentiary rules — may be constitutionally applied to FELA claims.

Nor does *Mayfield* support the decision below. *Mayfield* held that *forum non conveniens*, which is "nothing more or less than a supervening venue provision," *American Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994), is a procedural, not a substantive, doctrine. Whatever the proper characterization of *forum non conveniens*, H.B. 292's requirements here burden federal substantive rights. *See supra* pp. 14-18. To the extent the court read *Mayfield* as supporting a uniform safe harbor for all state procedural rules from preemption analysis, it erred.[11]

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conduct jury trials in a manner substantially similar to the jury trials conducted in the federal district courts").

[11] In addition, *Mayfield* is a valid-excuse case. *See Howlett v. Rose*, 496 U.S. 356, 374-75 (1990) (noting *Mayfield* is one of "only three occasions" the Court has found "valid excuse for a state court's refusal to entertain a federal cause of action"). This Court has been clear that "[a]n excuse that is inconsistent with or violates federal law is not a valid excuse: The Supremacy Clause forbids state courts to disassociate themselves from federal law because of disagreement with its content." *Id.* at 371. It follows that Ohio may not use H.B. 292 as a tool for disassociating state courts from federal FELA asbestos claimants.

b. The practice of an MDL court does not create a safe harbor for H.B. 292

The Ohio Supreme Court also held that the docket practice of the United States District Court for the Eastern District of Pennsylvania supported its conclusion that application of H.B. 292 to FELA claims was not preempted. *See* Pet. App. 14a. But that reasoning is unpersuasive for multiple reasons. Preliminarily, an opinion of a district court carries no weight as a matter of law, and it thus would be extraordinary to construe a single, unreviewed case management order as effectively creating a uniform safe harbor for all states to fetter the exercise of federal rights (especially when it is far from clear whether that court ever considered whether the practice could be applied to FELA claimants).[12]

More importantly, the order is nothing like the threshold evidentiary rules of H.B. 292. Under the order, asbestos claims initiated through a "mass screening" are subject to dismissal. Administrative Order No. 8, *In re Asbestos Prods. Liab. Litig.*, No. MDL 875, 2002 WL 32151574, ¶ 1 (E.D. Pa. Jan. 16, 2002). Any similarities between the order and H.B. 292 end there: under the order, a party may request reinstatement by filing an affidavit "setting forth the facts that qualify the case for active processing," and the affidavit need set forth only "*some evidence* of asbestos exposure and . . . an asbestos-related disease." *Id.* ¶ 3 (emphasis added). Unlike H.B. 292, the order

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[12] *See United States v. Articles of Drug Consisting of 203 Paper Bags*, 818 F.2d 569, 572 (7th Cir. 1987) (Posner, J.) ("A single district court decision . . . (especially one that cannot be appealed)[] has little precedential effect. It is not binding on the circuit, or even on other district judges in the same district.").

does not: define the quantum of evidence required for reinstatement, impose causation and evidentiary requirements stricter than those imposed under substantive law, define with specificity the qualifications of the medical professional that must provide a diagnosis, impose burdens of proof inconsistent with substantive law, or purport to regulate at all the contents of the affidavit.

Beyond those crucial distinctions, the MDL order, unlike H.B. 292, evidences no aim of decreasing asbestos liability for the sake of decreasing asbestos liability. The purpose and effects of H.B. 292 are patently hostile to policy choices made by Congress in enacting the FELA and previously applied by this Court. The Supremacy Clause simply does not tolerate states second-guessing federal policy choices made by Congress in such a manner.[13]

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[13] The Ohio Supreme Court's assertions that H.B. 292 is "neutral" and that the statute imposes a burden "no greater than [a Rule] 11 pleading standard," Pet. App. 12a, are wide of the mark. *Felder*, as well as this Court's FELA precedent, makes clear that neutrality alone does not immunize a rule from preemption. *See Felder*, 487 U.S. at 144-45; *Dice*, 342 U.S. at 362-63; *Brown*, 338 U.S. at 296-99. Furthermore, nothing in Federal Rule of Civil Procedure 11 requires a plaintiff, among other things, to make detailed threshold evidentiary showings that exceed the substantive elements of the cause of action.

II. THE COURT'S REVIEW OF THE OHIO SUPREME COURT'S DECISION IS URGENTLY NEEDED

A. The Decision Below Deepens Confusion Among State High Courts

The decision below substantially deepens confusion in state courts regarding FELA preemption. Certiorari is warranted to resolve that confusion.

1. It is generally settled that, "[w]hen adjudicating FELA cases, a state court is bound by federal substantive law." *Kauzlarich v. Atchison, T. & S.F. Ry.*, 910 S.W.2d 254, 256 (Mo. 1995). On the antecedent questions of under what circumstances a law is substantive or procedural and under what circumstances a law, even if procedural, unduly restricts federal rights, there is a patent absence of uniformity among state high courts.

The South Carolina Supreme Court, for example, has held, in direct conflict with the Ohio Supreme Court here, that issues relating to the sufficiency of evidence and proof are controlled by federal law. *See Haselden v. Atlantic Coast Line R.R.*, 53 S.E.2d 60, 63 (S.C. 1949) (holding in a FELA action that, "[i]n considering the evidence in this case," the court should evaluate sufficiency of evidence "in the light of the Federal decisions interpreting [FELA]"); *see also Montgomery v. CSX Transp., Inc.*, 656 S.E.2d 20, 28 (S.C. 2008) ("general standard of proof" in a FELA action is governed by "federal law"). So, too, has the Texas Supreme Court: "State courts trying FELA claims *must apply federal law about burdens of proof.*" *Union Pac. R.R. v. Williams*, 85 S.W.3d 162, 170 (Tex. 2002) (emphasis added).

In addition, the D.C. Court of Appeals has held that "[f]ederal law controls actions under FELA

in local as well as federal courts," and thus "that questions of *sufficiency of evidence* for the jury in cases arising under the act in state courts are to be determined by federal rules." *McMillan v. National R.R. Passenger Corp.*, 648 A.2d 428, 431 (D.C. 1994) (emphasis added, internal quotations omitted). Also in stark conflict with the decision below — upholding state prima facie evidentiary requirements — the Washington Supreme Court has held that "[t]he federal interest under the [FELA] extends to the determination of the minimum quantum of evidence the plaintiff must adduce to prove a prima facie case." *Adair v. Northern Pac. Ry.*, 392 P.2d 830, 831 (Wash. 1964).

The Missouri Supreme Court has reached similar conclusions. In *Kauzlarich*, the Missouri court faced the question whether a trial court's decision to allow a jury instruction (which was not in a state-approved list of jury instructions) on mitigation of FELA damages was a matter of state or federal law. The court reasoned that the *procedural* question whether to allow the instruction was a federal issue because of its relationship to *substantive* law: "[b]ecause the issue of mitigation of damages in an FELA case is a substantive matter under federal law, the trial court's refusal to allow [the] instruction . . . is at odds with federal law." 910 S.W.2d at 258.

By contrast, a second line of state high courts has held that a conclusion that a rule is procedural is the beginning *and* the end of the inquiry as to whether a rule may be applied to FELA claims. *See Allen v. National R.R. Passenger Corp.*, 934 So. 2d 1006, 1013-16 (Miss. 2006) (finding that it "may be" that, as a matter of federal law, "the evidentiary threshold is quite low for a FELA case to proceed to a jury,"

but holding that a trial court's refusal to allow an issue to go to a jury because of discovery issues was procedural, without assessing burden on FELA rights); *Rule v. Burlington N. & S.F. Ry.*, 106 P.3d 533, 536-37 (Mont. 2005) (holding that venue statute was procedural, without assessing burden on FELA rights); *Alabama Great Southern R.R. v. Jackson*, 587 So. 2d 959, 962 (Ala. 1991) (holding that "standard for reviewing the denial of a motion for a directed verdict" is a matter of state "procedur[e]," without assessing burden on FELA rights).[14]

Finally, other state high courts have held, like the Ohio Supreme Court here, that it is insufficient that a rule is procedural to insulate it from preemption analysis. In doing so, those courts cite the principle that a local rule cannot "lessen[] or destroy[]" a federal right, but then undertake no reasoned or meaningful analysis of the effect of the rule on the exercise of federal rights. *E.g.*, *Gaulden v. Burlington Northern, Inc.*, 654 P.2d 383, 391 (Kan. 1982) (conclusorily stating that application of comparative negligence statute would not "interfere with, lessen, or destroy" FELA rights); *Castro v. Chicago, R.I. & P.R.R.*, 415 N.E.2d 365, 367 (Ill. 1980) (holding that, under FELA, "a Federal substantive right cannot be

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[14] There also is a divide among state high courts and federal courts of appeals regarding whether federal evidentiary principles control. *Compare Brewer v. Denver & Rio Grande Western R.R.*, 31 P.3d 557, 563 n.3 (Utah 2001) (applying state rules to determine admissibility of evidence under FELA without assessing burden on FELA rights), *with Hose v. Chicago Northwestern Transp. Co.*, 70 F.3d 968, 977 n.11 (8th Cir. 1995) (rejecting argument state law governs evidentiary issues in FELA action; "[e]videntiary decisions in FELA cases are clearly a matter of federal law") (citing *Liepelt*, 444 U.S. at 492-93, 494 n.7).

lessened or destroyed by a State rule of procedure," and conclusorily stating no such impairment occurred).

2. The above discussion illustrates that there is longstanding confusion in — and sharp divisions among — state high courts regarding the legal principles that should govern when and if state rules may be applied to defeat FELA claims.

This case presents an ideal opportunity to bring clarity to at least some of the confusion regarding those questions. The issues raised are questions of law that have been fully vetted by a state trial court, appellate court, and high court, and there are no relevant disputes of material fact. Thus, this Court will be able to fashion rules governing FELA preemption on the basis of an undisputed record. Just as significantly, the threshold evidentiary requirements of H.B. 292 restrict FELA plaintiffs' rights through an assortment of rules, including burdens and standards of proof, substantive causation principles, and evidentiary requirements. For that reason, review of the Ohio Supreme Court's decision here would provide an opportunity to provide needed guidance regarding FELA preemption in the context of a wide range of different categories of state rules.

B. The Issues Raised Will Recur And Have Already Divided State High Courts

This Court's review also is needed now as the specific issues raised by the decision below are likely to recur and to create additional divisions among state courts. "[S]tate courts and legislators have accelerated efforts to deal with asbestos litigation." James L. Stengel, *The Asbestos End-Game*, 62 N.Y.U. Ann. Surv. Am. L. 223, 251 (2006). H.B. 292 is a precedent-setting statute in those reform efforts.

Georgia, for one, has "enacted asbestos legislation which is similar to H.B. 292."[15]

Indeed, the decision below substantially conflicts with the Georgia Supreme Court's review of the Georgia statute. In *Daimler Chrysler Corp. v. Ferrante*, 637 S.E.2d 659 (Ga. 2006), the Georgia court — though not adjudicating a preemption challenge, as the claims arose under state law — held that the statute's threshold evidentiary rules impose *substantive* burdens for the purpose of retroactivity analysis. The court reasoned that, prior to the statute's enactment, "a plaintiff was required to show only that exposure to asbestos was a *contributing* factor in his or her medical condition." *Id.* at 661. The statute, "by introducing the requirement that asbestos plaintiffs present prima facie evidence that asbestos was a *substantial* contributing factor to their medical condition, . . . imposes . . . a greater evidentiary burden than was required under the law in effect at the time" the claims were filed. *Id.* In conflict with the Ohio court, the Georgia court explained that "it makes no relevant difference that the Act does not alter [plaintiffs'] burden of proof at trial because regardless of when it must be shown, the Act makes proof that asbestos exposure was a substantial contributing factor *an essential element of an asbestos claim.*" *Id.* (emphasis added). For that reason, the statute affected "substantive rights." *Id.*

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[15] Presentation to Annual National Silica Litigation Conference, *Federal Preemption and State Imposed Medical Criteria in Asbestos and Silica Personal Injury Cases* 6 (Sept. 2006) ("*Preemption Presentation*"), *available at* http://www.gsfn.com/useful_tools/Silica2006-Handout.pdf.

Apart from Georgia, at least two other states have adopted statutes similar to H.B. 292.[16] Multiple other states, "including Kansas, South Carolina, Tennessee, Kentucky, Louisiana, Michigan, Missouri, New York, Pennsylvania, California, Virginia and West Virginia[,] have either pending or introduced" asbestos legislation that is "similar" to H.B. 292.[17] The Ohio Supreme Court's decision — affirming the right of a state to burden federal claimants in an effort to reform asbestos litigation — undoubtedly will serve as a bellwether for other states contemplating whether to restrict remedies afforded by federal law. *See* Mark A. Behrens & Andrew W. Crouse, *The Evolving Civil Justice Reform Movement*, 31 U. Dayton L. Rev. 173, 198 (2006) ("latest trend" is to follow Ohio approach to asbestos reform, and "[t]he number of states that consider medical criteria legislation will no doubt continue as more states explore solutions to address asbestos . . . litigation").

In short, the central issue raised in this case — whether states may burden the exercise of federal rights in an effort to manage asbestos litigation — is certain to recur and likely to deepen an existing conflict among state high courts. This Court should grant certiorari to make clear that, whatever the policy merits of state reform and however states wish to alter state-law claims, the Supremacy Clause precludes states from impeding the exercise of federal rights in pursuing those ends. *See Ayers*, 538 U.S. at 166; *Felder*, 487 U.S. at 143.

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[16] *See* Fla. Stat. Ann. §§ 774.201-774.209; Tex. Civ. Prac. & Rem. Code Ann. §§ 90.001-90.012.

[17] *Preemption Presentation* at 6.

C. The Decision Below Burdens Federal Rights And Creates An Immediate Lack Of Uniformity That Warrants Review

Finally, certiorari is warranted to remedy the disparity created by the decision below. Over the last century, this Court has regularly granted certiorari to review state court interpretations of the FELA. This Court's readiness to review such decisions reflects the weighty national interests served by the FELA as well as the imperative of uniformity that Congress has assigned to application of the statute. *See, e.g., Winfield*, 244 U.S. at 149 (issues regulated by FELA "are matters in which the nation as a whole is interested, and there are weighty considerations why the controlling law should be uniform and not change at every state line"). As this Court explained in *Brown*, certiorari was warranted "because the implications of the dismissal [of FELA claims] were considered important to a correct and uniform application of the federal act in the state and federal court." 338 U.S. at 295; *see also* Wright § 45, at 272 ("[T]he Supreme Court has been astute to protect the rights of FELA plaintiffs.").

Those considerations compel certiorari here. The decision below creates an immediate lack of uniformity in application of an important federal statute: the burdens facing railroad workers bringing suit in Ohio are now materially different from those facing workers bringing suit in other states or in federal court. Only this Court is positioned to remedy that disparity. Given the powerful interest in uniformity embodied in the FELA, this Court should resolve that disparity now. *See Dice*, 342 U.S. at 361 (granting certiorari to review Ohio Supreme Court FELA decision that "appeared to deviate from previous

decisions of this Court that federal law governs cases arising under the [FELA]").

In other contexts, this Court has been resolute to guard against individual (and idiosyncratic) state and local laws that burden federal interests, even in the absence of express conflicts. *See, e.g., Rice v. Cayetano*, 528 U.S. 495, 498-511 (2000) (granting certiorari to resolve constitutionality of unique Hawaii statute that burdened Fifteenth Amendment rights without discussion of conflict); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 389-90 (1994) (granting certiorari to review local ordinance that unduly burdened interstate commerce without discussion of conflict); *Chemical Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 339 (1992) (granting certiorari to review whether state statute that imposed fee on hazardous waste violated Commerce Clause "[b]ecause of the importance of the federal question and the likelihood that it had been decided in a way conflicting with applicable decisions of this Court"). Given the significance of the FELA and the congressional interest in uniformity underlying the statute, the same result is called for here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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